

November 2, 2004

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-39 is available for public comments under this procedure. It was requested by Chris Vance on behalf of the Washington State Republican Party.

Proposed Advisory Opinion 2004-39 is scheduled to be on the Commission's agenda for its public meeting of Thursday, November 4, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on November 3, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-39, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 2, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Jonathan M. Levin
Senior Attorney

Robert M. Knop
Attorney

Subject: Draft AO 2004-39 – Alternative Drafts

The Office of General Counsel has prepared two draft Advisory Opinions related to the request by the Washington State Republican Party. The request asks how the requestors may raise and spend funds for a recount connected to the 2004 general election in the State of Washington. Draft A concludes that because election recount expenses are “in connection with” a Federal election, the Washington State Republican Party must pay for election recount expenses out of its Federal account under 11 CFR 300.30(b)(3). Funds raised and spent for its election recount fund must comply with the amount limitations, source prohibitions, and reporting requirements of the Act. Draft B concludes that election recount expenses are not in connection with a Federal election.

Therefore, the Washington State Republican Party may raise and spend recount funds so long as it complies with Commission regulations that do not impose the amount limitations or reporting requirements of FECA, but do prohibit recount funds from including money from prohibited sources.

OGC recommends that the Commission adopt Draft A.

Attachment

Drafts A and B

1 ADVISORY OPINION 2004-39

2
3 Mr. Chris Vance
4 Chairman
5 Washington State Republican Party
6 16400 Southcenter Parkway, Suite 200
7 Seattle, WA 98188

8
9 Dear Mr. Vance:

10
11 We are responding to your inquiry regarding the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations, to
13 a fund that the Washington State Republican Party (the “State Party”) is planning to
14 establish to pay for recount expenses that may arise concerning one or more Federal
15 elections (“election recount fund”) in the State of Washington. Because election recount
16 activities are in connection with a Federal election, the election recount fund must
17 comply with the amount limitations, source prohibitions, and reporting requirements of
18 the Act. The State Party’s officers and staff members may operate the election recount
19 fund and a candidate or Federal officeholder may raise funds for the election recount
20 fund that comply with the Act. In addition, the State of Washington’s limitation on
21 donations from political action committees to the State Party’s election recount fund and
22 its reporting requirements applicable to election recount activities are preempted by
23 Federal law.

24 ***Background***

25 The facts of this request are presented in your letter dated October 12, 2004 and
26 your electronic mail message dated October 15, 2004.

27 The State Party intends to establish the election recount fund to finance recount
28 activities arising from one or more Federal elections in Washington to be held on

1 November 2, 2004. The election recount fund will be established and administered by
2 the State Party's leadership and staff. No Federal officeholders or candidates will
3 exercise decision-making authority over the raising or spending of monies raised by the
4 election recount fund. However, the State Party intends to host Federal officeholders,
5 candidates, and their agents as featured guests at State Party events that raise Federally
6 permissible monies for the election recount fund.

7 No monies raised by the election recount fund will be used to finance Federal
8 election activities, coordinated or independent expenditures, exempt party activities, or
9 any communications referring to any Federal candidate prior to or on election day.

10 Rather, all monies raised by the election recount fund will be used to pay for expenses
11 resulting from a recount, election contest, or other similar activities, including counting
12 provisional ballots, absentee ballots, and ballots cast in polling places, and litigation and
13 administrative proceeding expenses regarding the casting and counting of ballots
14 concerning one or more Federal elections held in Washington State on November 2,
15 2004.

16 The State of Washington does not limit the amount that individuals may
17 contribute to the State Party or the amount that political action committees ("PACs") may
18 contribute to the State Party for exempt activities such as ballot counting. Wash. Rev.
19 Code § 42.17.640 (2004). It does, however, prohibit PACs from contributing more than
20 \$3,400 per calendar year to the State Party for non-exempt activities, such as litigation
21 and administrative proceeding expenses regarding the casting and counting of ballots. *Id.*
22 In addition, the State of Washington requires the State Party to report the election recount

1 fund's receipts and disbursements. *See* Wash. Rev. Code § 42.17.030 through 42.17.135
2 (2004).

3 ***Questions Presented***

4 *1. Is the State Party permitted to raise funds from individuals and Federal*
5 *political committees in unlimited amounts for a fund that it will use to finance recount,*
6 *election contest, and similar activities that may arise from a Federal election?*

7 *2. Are the State Party's officers and staff permitted to organize and operate the*
8 *election recount fund if it contains monies raised in unlimited amounts from individuals*
9 *and Federal political committees? Is the State Party required to establish a separate*
10 *account for these purposes?*

11 *3. Must the State Party report the election recount fund's receipts and*
12 *disbursements to the Commission?*

13 *4. May Federal officeholders, candidates, and their agents appear as featured*
14 *guests or speak at an event held to raise monies for the State Party's election recount*
15 *fund? May Federal officeholders and candidates sign letters or make telephone calls*
16 *soliciting donations for an election recount fund?*

17 *5. If the State Party is permitted to establish an election recount fund, are any*
18 *contrary State laws superseded and preempted under 2 U.S.C. 453 and 11 CFR 108.7?*

19 ***Legal Analysis and Conclusions***

20 *1. Is the State Party permitted to raise funds from individuals and Federal*
21 *political committees in unlimited amounts for a fund that it will use to finance recount,*
22 *election contest, and similar activities that may arise from a Federal election?*

1 No, the State Party is not permitted to raise funds from individuals and Federal
2 political committees in unlimited amounts for a fund that it will use to finance recount,
3 election contest, and similar activities arising from a Federal election.

4 The Act and Commission regulations define the terms “contribution” and
5 “expenditure” to include any gift, loan, or payment of money or anything of value for the
6 purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR
7 100.52(a) and 100.111(a). Commission regulations make exceptions from the cited
8 definitions for gifts, loans, or payments made with respect to a recount of the result of a
9 Federal election, or an election contest concerning a Federal election. 11 CFR 100.91
10 and 100.151. Nonetheless, these recount regulations expressly bar the receipt or use of
11 funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor
12 organizations, and national banks). *Id.*

13 Although not “contributions” or “expenditures,” monies in the election recount
14 fund are being donated and disbursed specifically to determine the outcome of particular
15 Federal elections, and not for any other purpose. Thus, election recount funds are
16 received and disbursed for activities in connection with a Federal election. Pursuant to
17 11 CFR 102.5(a)(1) and 300.30(b)(3)(iii), all disbursements made by a State party, with
18 Federal and non-Federal accounts, in connection with a Federal election must be made
19 from a Federal account.¹ In addition, only funds that comply with the amount limitations,
20 source prohibitions, and reporting requirements of the Act (“Federal funds”) may be
21 deposited in a Federal account. *See* 11 CFR 102.5(a)(1)(i) and 300.2(g). Accordingly,

¹ The only exceptions pertain to disbursements from special allocation accounts. Recount activities exclusively for Federal elections are not allocable activities.

1
2 the State Party may only raise and spend Federal funds on election recount activities.²
3 Consequently, donations to the election recount fund from an individual, a political
4 committee, or a multicandidate political committee must be aggregated with the
5 contributions made by such person to the State Party during the calendar year for
6 purposes of 2 U.S.C. 441a(a)(1)(D) (individuals and political committees) and
7 441a(a)(2)(c) (multicandidate political committees).

8 2. *Are the State Party's officers and staff permitted to organize and operate the*
9 *election recount fund if it contains monies raised in unlimited amounts from individuals*
10 *and Federal political committees? Is the State Party required to establish a separate*
11 *account for these purposes?*

12 No, for the reasons explained above, the State Party's officers and staff are not
13 permitted to organize and operate an election recount fund containing monies raised in
14 unlimited amounts from individuals and Federal political committees. In addition, to
15 ensure that donations to the election recount fund are used exclusively for recount
16 purposes and not for other purposes, the State Party must establish a separate Federal
17 account for recount purposes.

18 3. *Must the State Party report the election recount fund's receipts and*
19 *disbursements to the Commission?*

² The Commission's regulations at 11 CFR 100.91 and 100.151 are not inconsistent with this opinion. Those regulations exclude recount funds from the definitions of "contribution" and "expenditure," but they do not address the requirements that State parties make all disbursements in connection with a Federal election from the Federal account. *See* 11 CFR 300.30(b)(3)(iii); *see also* 11 CFR 102.5(a). Furthermore, the recount regulations do not address amount limitations or reporting requirements imposed by operation of 2 U.S.C. 441i(e). *See* discussion of section 441i(e)'s requirements as applied to election recount funds, below.

1 Yes, the State Party must report the election recount fund's receipts and
2 disbursements to the Commission in accordance with 2 U.S.C. 434 and 11 CFR 104.3
3 because the election recount fund is a federal account of a state party committee.

4 *4. May Federal officeholders, candidates, and their agents appear as featured*
5 *guests or speak at an event held to raise monies for the State Party's election recount*
6 *fund? May Federal officeholders and candidates sign letters or make telephone calls*
7 *soliciting donations for an election recount fund?*

8 Yes, Federal candidates, officeholders, and their agents may appear as featured
9 guests or speak at an event held to raise monies for the State Party's election recount
10 fund. At these events, they may solicit Federal funds for the election recount fund. *See 2*
11 *U.S.C. 441i(e)(1)(A).* In addition, Federal officeholders and candidates may sign letters
12 or make telephone calls soliciting only Federal funds for an election recount fund.

13 *5. If the State Party is permitted to establish an election recount fund, are any*
14 *contrary State laws superseded and preempted under 2 U.S.C. 453 and 11 CFR 108.7?*

15 The Act states that its provisions and the rules prescribed thereunder "supersede
16 and preempt any provision of State law with respect to election to Federal office." 2
17 U.S.C. 453(a); 11 CFR 108.7(a). The House committee that drafted this provision
18 explained its meaning in sweeping terms, stating that it is intended "to make certain that
19 the Federal law is construed to occupy the field with respect to elections to Federal office
20 and that the Federal law will be the sole authority under which such elections will be
21 regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the
22 Conference Committee report on the 1974 Amendments to the Act, "Federal law
23 occupies the field with respect to criminal sanctions relating to limitations on campaign

1 expenditures, the sources of campaign funds used in Federal races, the conduct of Federal
2 campaigns, and similar offenses, but does not affect the States' rights" as to other areas
3 such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69
4 (1974). The Conference Report also states that Federal law occupies the field with
5 respect to reporting and disclosure of political contributions to and expenditures by
6 Federal candidates and political committees, but does not affect State laws as to the
7 manner of qualifying as a candidate, or the dates and places of elections. *Id.* at 100-101.

8 When the Commission promulgated regulations at 11 CFR 108.7 on the effect of
9 the Act on State law, it stated that the regulations follow section 453 and that,
10 specifically, Federal law supersedes State law with respect to the organization and
11 registration of political committees supporting Federal candidates, disclosure of receipts
12 and expenditures by Federal candidates and political committees, and the limitations on
13 contributions and expenditures regarding Federal candidates and political committees.
14 Federal Election Commission Regulations, Explanation and Justification, House
15 Document No. 95-44, at 51; 11 CFR 108.7(b). The regulations also provide, however,
16 that the Act does not supersede state laws concerning the manner of qualification as a
17 candidate or political party organization, dates and places of elections, voter registration,
18 voting fraud and similar offenses, or candidates' personal financial disclosure. 11 CFR
19 108.7(c). The Commission explained that "[t]hese types of electoral matters are interests
20 of the states and are not covered in the Act." House Document No. 95-44, at 51.

21 As the legislative history of 2 U.S.C. 453 shows, "the central aim of the clause is
22 to provide a comprehensive, uniform Federal scheme that is the sole source of regulation
23 of campaign financing . . . for election to Federal office." Advisory Opinion 1988-21;

1 *see also* Advisory Opinions 2000-23 and 1999-12. Commission regulations, following
2 the legislative history, divide election activity into two categories; one pertaining to the
3 financial activity of candidates and political committees in Federal campaigns, and the
4 other pertaining to the States' traditional function of conducting elections. The former is
5 subject to the Act's preemption; the latter is not. Although donations to and
6 disbursements from the State Party's election recount fund are not "contributions" or
7 "expenditures" under the Act, they clearly fall within the first category because these
8 financial activities of political committees are in connection with a Federal election.
9 Accordingly, the State of Washington's amount limit on donations to the State Party's
10 election recount fund from political action committees is preempted by the Act, and the
11 source restrictions at 11 CFR 100.91 and 100.151 apply instead. Moreover, in view of
12 the fact that the donations to the election recount fund and the disbursements from such
13 funds are in connection with a Federal election, and not in connection with any non-
14 Federal election, the reporting requirements of the Act and Commission regulations
15 preempt the reporting requirements of Washington State law.

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
19 any of the facts or assumptions presented, and such facts or assumptions are material to a

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2 conclusion presented in this advisory opinion, then the requestor may not rely on that

3 conclusion as support for its proposed activity.

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Sincerely,

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Bradley A. Smith

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Chairman

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13

14 Enclosures (AOs 2000-23, 1999-12 and 1988-21)

1 ADVISORY OPINION 2004-39

2
3 Mr. Chris Vance
4 Chairman
5 Washington State Republican Party
6 16400 Southcenter Parkway, Suite 200
7 Seattle, WA 98188

8
9 Dear Mr. Vance:

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11 We are responding to your inquiry regarding the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations, to
13 a fund that the Washington State Republican Party (the “State Party”) is planning to
14 establish to pay for recount expenses that may arise concerning one or more Federal
15 elections (“election recount fund”) in the State of Washington. Because funds raised and
16 spent for election recount activities are not in connection with a Federal election, the
17 State Party is permitted to raise and spend unlimited funds from individuals and Federal
18 political committees for the election recount fund, provided the funds are not from
19 prohibited sources. The State Party’s officers and staff members may operate the
20 election recount fund, and a candidate or Federal officeholder may appear as a featured
21 guest and speak at fundraising event for the election recount fund. A Federal
22 officeholder or candidate may also solicit funds for the election recount fund so long as
23 the funds solicited comply with the source prohibitions in the Commission’s regulations.
24 In addition, the State of Washington’s limitation on donations from political action
25 committees to the State Party’s election recount fund is not preempted by Federal law.

1

2 ***Background***

3 The facts of this request are presented in your letter dated October 12, 2004 and
4 your electronic mail message dated October 15, 2004.

5 The State Party intends to establish the election recount fund to finance recount
6 activities arising from one or more Federal elections in Washington to be held on
7 November 2, 2004. The election recount fund will be established and administered by
8 the State Party's leadership and staff. No Federal officeholders or candidates will
9 exercise decision-making authority over the raising or spending of monies raised by the
10 election recount fund. However, the State Party intends to host Federal officeholders,
11 candidates, and their agents as featured guests at State Party events that raise Federally
12 permissible monies for the election recount fund.

13 No monies raised by the election recount fund will be used to finance Federal
14 election activities, coordinated or independent expenditures, exempt party activities, or
15 any communications referring to any Federal candidate prior to or on election day.
16 Rather, all monies raised by the election recount fund will be used to pay for expenses
17 resulting from a recount, election contest, or other similar activities, including counting
18 provisional ballots, absentee ballots, and ballots cast in polling places, and litigation and
19 administrative proceeding expenses regarding the casting and counting of ballots
20 concerning one or more Federal elections held in Washington State on November 2,
21 2004.

22 The State of Washington does not limit the amount that individuals may
23 contribute to the State Party or the amount that political action committees ("PACs") may

1 contribute to the State Party for exempt activities such as ballot counting. Wash. Rev.
2 Code § 42.17.640 (2004). It does, however, prohibit PACs from contributing more than
3 \$3,400 per calendar year to the State Party for non-exempt activities, such as litigation
4 and administrative proceeding expenses regarding the casting and counting of ballots. *Id.*

5 ***Questions Presented***

6 *1. Is the State Party permitted to raise funds from individuals and Federal*
7 *political committees in unlimited amounts for a fund that it will use to finance recount,*
8 *election contest, and similar activities that may arise from a Federal election?*

9 *2. Are the State Party's officers and staff permitted to organize and operate the*
10 *election recount fund if it contains monies raised in unlimited amounts from individuals*
11 *and Federal political committees? Is the State Party required to establish a separate*
12 *account for these purposes?*

13 *3. Must the State Party report the election recount fund's receipts and*
14 *disbursements to the Commission?*

15 *4. May Federal officeholders, candidates, and their agents appear as featured*
16 *guests or speak at an event held to raise monies for the State Party's election recount*
17 *fund? May Federal officeholders and candidates sign letters or make telephone calls*
18 *soliciting donations for an election recount fund?*

19 *5. If the State Party is permitted to establish an election recount fund, are any*
20 *contrary State laws superseded and preempted under 2 U.S.C. 453 and 11 CFR 108.7?*

1

2 ***Legal Analysis and Conclusions***

3 *1. Is the State Party permitted to raise funds from individuals and Federal*
4 *political committees in unlimited amounts for a fund that it will use to finance recount,*
5 *election contest, and similar activities that may arise from a Federal election?*

6 Yes, the State Party is permitted to raise funds from individuals and Federal
7 political committees in unlimited amounts for a fund that it will use to finance recount,
8 election contest, and similar post-election activities arising from a Federal election,
9 provided that the individuals are not foreign nationals.

10 The Act and Commission regulations define the terms “contribution” and
11 “expenditure” to include any gift, loan, or payment of money or anything of value for the
12 purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and (9)(A)(i);
13 11 CFR 100.52(a) and 100.111(a). Commission regulations promulgated before the
14 enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116
15 Stat. 81 (2002) (“BCRA”), make exceptions from the cited definitions for gifts, loans, or
16 payments made with respect to a recount of the results of a Federal election.
17 11 CFR 100.91 and 100.151.¹ The Commission explained these exclusions of costs of
18 recounts by stating that “since, though [recounts and election contests] are related to
19 elections, [they] are not Federal elections as defined by the Act.” H.R. Doc. No. 95-44,
20 at 40 (1977). The Act defines elections to include, *inter alia*, primary, general, special

¹ These regulations were recodified without substantive change from 11 CFR 100.7(b)(20) and 100.8(b)(20), effective November 6, 2002. *See* 67 Fed. Reg. 50582 (Aug. 5, 2002). Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). *See* 45 Fed. Reg. 15080 (Mar. 7, 1980).

1 and runoff elections, but it does not address recounts or election contests. *See* 2 U.S.C.
2 431(1); *see also* 11 CFR 100.2.

3 Moreover, the Commission discerns no evidence that Congress intended through
4 BCRA to overturn implicitly either the Commission's longstanding rules or advisory
5 opinions on the treatment of recount funds. *See* 2 U.S.C. 431(1). The Commission
6 concludes that recounts are not elections under the Act, so funds received and spent in
7 connection with a recount are not funds received or spent in connection with a Federal
8 election, and are therefore not subject to 11 CFR 300.30(b)(3)(iii). The recount
9 regulations nonetheless expressly bar the receipt or use of funds prohibited by
10 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor organizations, and
11 national banks). 11 CFR 100.91 and 100.151. Accordingly, the State Party is permitted
12 to raise funds from individuals and Federal political committees in unlimited amounts for
13 the election recount fund, provided that the individuals are not foreign nationals.

14 *2. Are the State Party's officers and staff permitted to organize and operate the*
15 *election recount fund if it contains monies raised in unlimited amounts from individuals*
16 *and Federal political committees? Is the State Party required to establish a separate*
17 *account for these purposes?*

18 Yes, the State Party's officers and staff are permitted to organize and operate a
19 election recount fund containing monies raised in unlimited amounts from individuals
20 and Federal political committees. The State Party is not required to establish a separate
21 non-Federal account for recount purposes, provided the State Party's non-Federal
22 account used to pay for election recount expenses does not contain any funds that are

1 from sources that are prohibited from donating to the election recount fund under 11 CFR
2 100.91 and 100.151. *See* Advisory Opinion 1998-26.

3 *3. Must the State Party report the election recount fund's receipts and*
4 *disbursements to the Commission?*

5 If the State Party chooses to pay for its recount activities with Federal funds out
6 of its Federal account, then it must comply with the Act's reporting requirements. *See*
7 *generally* 2 U.S.C. 434(b); 11 CFR 104.3. If, instead, the State Party chooses to pay for
8 its recount activities through a non-Federal account, then no Federal reporting obligations
9 arise.

10 *4. May Federal officeholders, candidates, and their agents appear as featured*
11 *guests or speak at an event held to raise monies for the State Party's election recount*
12 *fund? May Federal officeholders and candidates sign letters or make telephone calls*
13 *soliciting donations for an election recount fund?*

14 Yes, Federal officeholders, candidates, and their agents may appear as featured
15 guests or speak at an event held to raise monies for the State Party's election recount
16 fund. In addition, Federal officeholders and candidates may sign letters and make
17 telephone calls soliciting donations for an election recount fund, so long as the funds
18 solicited comply with the source prohibitions in Commission regulations regarding
19 recounts in 11 CFR 100.91 and 100.151.

20 Under BCRA, candidates and Federal officeholders may not solicit, receive,
21 direct, transfer, or spend funds "in connection with an *election* for Federal office" unless
22 the funds are subject to the limitations, prohibitions, and reporting requirements of the
23 Act. 2 U.S.C. 441i(e)(1)(A) (emphasis added). BCRA also imposes limitations on the

1 funds Federal candidates may solicit, receive, direct, transfer, or spend “in connection
2 with any *election* other than an election for Federal office.” 2 U.S.C. 441i(e)(1)(B)
3 (emphasis added). However, as explained above, recounts are not elections under the Act
4 and election recount funds are not in connection with a Federal election. Thus, funds
5 received and spent in connection with a recount are not funds received or spent in
6 connection with an election, and are therefore not subject to 2 U.S.C. 441i(e)(1).
7 Moreover, the Commission discerns no evidence that Congress intended through BCRA
8 to implicitly overturn either the Commission’s longstanding rules or advisory opinions on
9 the treatment of recount funds. *See* 2 U.S.C. 431(1).²

10 Consequently, BCRA’s new restrictions in 2 U.S.C. 441i(e)(1) on Federal
11 candidates soliciting, receiving, directing, transferring, or spending funds in connection
12 with either Federal or non-Federal elections do not apply to election recount funds and
13 thus do not alter the prior treatment of funds raised and spent by Federal candidates on
14 recounts. Therefore, Federal officeholders, candidates, and their agents may solicit funds
15 for the State Party’s election recount fund so long as the funds solicited comply with the
16 source prohibitions in Commission regulations regarding recounts.

17 5. *If the State Party is permitted to establish an election recount fund, are any*
18 *contrary State laws superseded and preempted under 2 U.S.C. 453 and 11 CFR 108.7?*

19 The Act states that its provisions and the rules prescribed thereunder “supersede
20 and preempt any provision of State law with respect to election for Federal office.” 2
21 U.S.C. 453(a); 11 CFR 108.7(a). Congress intended that the Federal law should be

² The absence of 2 U.S.C. 441i(e) in BCRA’s section 402(a)(4), which is entitled “Provisions not to apply to runoff elections,” may reflect Congress’s understanding that 2 U.S.C. 441i(e) does not apply to recounts because they are not elections under 2 U.S.C. 431(1).

1 “construed to occupy the field with respect to elections to Federal office and that the
2 Federal law will be the sole authority under which such elections will be regulated.”
3 H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). It specifically defined this field
4 as covering “limitations on campaign expenditures, the sources of campaign funds used
5 in Federal races, the conduct of Federal campaigns, and similar offenses,” but not the
6 States’ rights as to other areas such as false registration, voter fraud and ballot theft, the
7 manner of qualifying as a candidate, or dates and places of elections. H.R. Rep. No. 93-
8 1438, 93d Cong., 2d Sess. 69, 100-101. (1974). Commission regulations rely on this
9 legislative history and embody the explicit Congressional intent to preempt by providing
10 that the Act supersedes State law with respect to the organization and registration of
11 political committees supporting Federal candidates, disclosure of receipts and
12 expenditures by Federal candidates and political committees, and the limitations on
13 contributions and expenditures regarding Federal candidates and political committees.
14 11 CFR 108.7(b); *see also* Federal Election Commission Regulations, Explanation and
15 Justification, House Document No. 95-44, at 51.³

16 The limit of the Act’s preemption power, therefore, is the field of financial
17 activities in connection with Federal campaigns. In view of the conclusion that the
18 activities of the recount fund are not in connection with a Federal election, the Act’s
19 preemptive powers do not extend to the receipts and disbursements of the fund.
20 Therefore, the provisions of Washington State law, rather than 11 CFR 100.91 and
21 100.151 apply.

³ The Act does not supersede State laws concerning such matters as the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration, voting fraud and similar offenses, and candidates’ personal financial disclosure. 11 CFR 108.7(c). “These types of electoral matters are interests of the states and are not covered in the Act.” House Document No. 95-44, at 51.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Bradley A. Smith
Chairman

Enclosures (AO 1998-26)